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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 689

689

E. B. SHIPMAN and E. A. SHIPMAN, Individually and Trading as SHIPMAN BROTHERS, et al,
Appellants

versus

ANDREW J. DUPRE, et al, composing the South Carolina State Board of Fisheries, a body corporate, and ALONZO B. SEABROOK, the Chief Inspector thereof,
Appellees

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

E. B. SHIPMAN and E. A. SHIPMAN, Individually, and Trading as SHIPMAN BROTHERS, et al,

Appellants

versus

ANDREW J. DUPRE, et al,

Appellees

Brief of Appellants Opposing Motion To Dismiss Appeal

October Term, 1950

Appellants avail themselves under Rule 7 of the Supreme Court of the United States of the privilege of answering the motion to dismiss or affirm filed by appellees.

The points raised in the motion filed by appellees can be summarized for the sake of brevity into three grounds, (a) That there are no substantial grounds for Supreme Court intervention, (b) That the statutes are constitutional, and (c) That appellants have an adequate remedy in the State Courts of South Carolina.

It should be pointed out that this is not a case in which the only questions involved are merely whether there is oppressive action either by the State or its agencies against one or two isolated individuals. If this were the only question it might be argued that this question perhaps could be adjudicated in the State Court, and appealed later to the Supreme Court for determination of the constitutionality of the statutes under review.

The record in this case shows that this is a continuation of the general scheme of oppression practiced by the State of South Carolina against fishing interests. It first was brought to the attention of this Court in the case of *Toomer vs. Witsell*, 334 U.S. 385, by present counsel, in which this Court was acquainted with the onerous restrictions placed upon non-resident fishermen. This case complains of similar practices by the State, this time in a different form and visited upon fishermen of one of the sections of the State itself.

A great deal of water has flowed over the dam since the days of *McCready vs. Virginia*, 94 U. S. page 391, and this Court in the decision rendered in *Toomer vs. Witsell*, supra, recognized the fact that the fishing business had gained national importance.

It must be kept in mind that onerous laws by one state beget onerous laws by others, and while it is true that the appellants herein are all residents of the offending state, the record shows that one fisherman, not a party to this case, was a non-resident whose boat was seized and who was unlawfully forced to part with five hundred dollars to save his vessel. Such continued acts of oppression cannot help but offend fishermen of other states and consequently invite recriminatory measures by other states as shrimping and fishing is a migratory business, and this probability was recognized by this Court in *Toomer vs. Witsell* and commented upon.

An examination of the record in the instant case shows that for more than three years, the authorities of South Carolina under unlawful and repressive statutes hounded and chased down a large lawful industry,

striking terror to the hearts of the owners and their crews, and depriving these men of thousands of dollars of revenues, and the crews of large sums of wages, and generally disrupted the industry and created such a state of confusion as to paralyze the trade in a large section of the State. Vessels were temporarily seized, large catches of shrimp summarily and unlawfully seized and confiscated, dozens of vessels unlawfully boarded and more than a score of cases made against the alleged offending owners and workmen. Not only was this practice continued but in the trial of the case before the three-judge Court, appellees stated openly their intention to seize and to confiscate boats and cargo for even the most minor violation. It is specious to say that the claim and delivery statutes of South Carolina afford appellants ample relief, and not until appellants have run the gamut of the State Courts, should they have a right to appeal to this Court. We might ask, what good would a decree of this Court do at that late date, when boats, cargo and men, in fact the entire businesses had gone? What relief or remedy in damages could be brought against a Sovereign State?

In *Toomer vs. Witsell*, supra, this same argument was presented by appellees, and answered by Mr. Chief Justice Vinson, in these strong words, "defiance would have carried with it the risk of heavy fines and long imprisonment, and withdrawal from further fishing until a test case had been taken through the South Carolina courts and perhaps to this Court would have resulted in a substantial loss of business for which no compensation could be obtained." In that case the matter of confiscation of vessels worth thousands of dollars was not actually in issue as in the instant case, as no

statute was attacked that dealt with confiscation of vessels.

Appellees argue that the only threatened result is a multiplicity of criminal violations and an impairment of private business. If this were all, it would still cover almost every gamut of a person's endeavor, but the results that follow from the enforcement of these statutes are much more fundamental. This case does not touch merely on the rights of a few individuals, it touches on the constant struggle of individuals against State to prevent this continued encroachment on the few remaining liberties left to the ordinary individual against regimentation or control. It means that from these statutes other statutes more repressive and oppressive in nature would probably be enacted and would lead to a paralysis of the fishing industry. It would mean inflation in the cost of fish, one of the vitals of our food economy, for with restriction there always ensues inflation. The fish industry today involves investments of millions of dollars and livelihoods of thousands of persons. Its revenues are tremendous and the impact and effect of an adverse decision would be of tremendous import to the national economy. This Court has the right with its power and prestige to step into any economic situation where the interest of thousands and perhaps millions of its citizens are vitally concerned.

It is fundamental law that Federal Courts have jurisdiction to enjoin enforcement of an unconstitutional state statute by state officers clothed with authority to enforce it, especially where it violates the Federal Constitution, provided the remedy at law is inadequate, the enforcement will affect the property rights of the plaintiff, the injunction is necessary to prevent irrep-

arable injury and the case is reasonably free from doubt

Caldwell vs. Sioux Fall Stockyards Co.
242 U. S. 559

Chicago vs. Kendall
266 U. S. 94

Davis vs. Wallace
257 U. S. 478

Green vs. Louisville
244 U. S. 499

Keokuk and Hamilton Bridge Co. vs. Salm
258 U. S. 122

Pennsylvania vs. West Virginia
262 U. S. 553

Public Service Co of North Illinois vs. Corboy
250 U. S. 153

Reagan vs. Farmer's Loan & Trust Co.
154 U. S. 362

Toomer vs. Witsell, supra

Tyson & Bros. United Theater Ticket Offices vs. Banton
278 U. S. 418

Wells, Fargo & Co. vs. Taylor
254 U. S. 175, 183

Ex Parte Young
209 U. S. 123

Arrowsmith vs. Voorhies
55 F. 2d 310

Atlantic Refining Co. vs. Trumbull
43 F. 2d 154

Cotting vs. Kansas City Stockyards
79 F. 679

Elmer vs. Wallace
275 F. 86

Michigan Cent. R. Co. vs. Michigan Utilities Comm.
271 F. 319

Williams vs. McCartan
212 F. 345

Henderson vs. Thompson
12 F. Supp. 519

Joyner vs. Browning
30 F. Supp. 512

Mutual Orange Distributors vs. Agricultural Pro Rate Commission of Calif.
30 F Supp. 937

Cyclopedia of Federal Procedure
(2 Ed), Vol. 13 Sec. 6570, and Footnotes, pp. 130-131-132 (Callaghan & Co.) 1944

The right to go into a Federal Court for relief where a constitutional question is involved and where the amount in question is over Three Thousand ($3,000.00) Dollars is fixed by the terms of the statute itself.

"District courts have original jurisdiction in all suits of a civil nature at common law or in equity *** where the controversy exceeds *** the sum or value of $3,000.00 *** and (a) arises under the Constitution or laws of the United States ***".

Judicial Code, Section 24 amended
Title 28 USCA Sec. 41, page 32

Bell vs. Hood
327 U. S. 678

Holt vs. Indiana Mfg. Co.
176 U. S. 374

Home Tel. & Tel. Co. vs. Los Angeles
227 U. S. 228

Prentis vs. A.C.L.
211 U. S. 210

Smythe vs. Ames
169 U. S. 466

U. S. vs. Sayward
160 U. S. 493
40 L. Ed. 509

Wilcox vs. Consolidated Gas Co.
212 U. S. 19

In answer to the question that "where there is an adequate remedy in the State courts to redress a wrong, why bring the action in the Federal courts until the state remedies are exhausted?" we quote the language of Mr. Chief Justice White in the case of *Home Tel. and Tel. Co. vs. Los Angeles*, supra,

> "The enforcement of this doctrine (wait until the state courts have acted) would render impossible the performance of the duty imposed on Federal Courts and inevitable paralysis would result."

The cases of the *East Coast Lumber Terminal vs. Town of Babylon*, 174 F. 2d 106, *Parker vs. Los Angeles*, 94 L. Ed. (Adv.) 133 and *Alabama State Fed. of Labor vs. McAdory*, 325 U. S. 462 cited by the appellees, are inapplicable to the case at bar. In those cases the Supreme Court held that the matter would first have to be determined by the State Courts because the statutes involved were ambiguous, the meaning was not clear, and that said statutes being ambiguous should first be interpreted by a state Court to

determine if there was an issue under the United States Constitution. This principle is not new. In the present case however, the statutes under attack are not ambiguous and require no interpretation by State Courts.

The statutes under attack permit condemnation but make no provision for procedure, trial or appeal. In the case of *Matthews vs. Rodgers*, 284 U. S. 521, 76 L. Ed. 447, federal jurisdiction was denied until the case had run the gamut of the State Courts because there the statutes provided that taxes paid under protest could be recovered. Such is not true in the statutes now questioned. The so-called Section 846 and the "claim and delivery" statute which appellees are herein invoking as a delaying action are inapplicable. The authorities of South Carolina do not even profess that they will proceed under those statutes. In one instance, testimony in the record shows an allusion to a $500.00 bond being posted by a fisherman named Cesaroni whose boat had been taken. It was not until later when this proceeding was brought, that a sham case was filed against him to legalize the illegitimacy of the taking.

Under the South Carolina "claim and delivery" statute appellants would have to wait for seizure of their vessels, and to invite continued and repeated seizures and disruption of their businesses.

No provision for giving bond and keeping the vessels pending determination is provided in the statutes referred to. The action in the Cesaroni case was a "make believe" to cover up an illegal taking from a fisherman who was afraid to take a risk of the loss of a $20,000.00 boat on an adverse judicial decision when offered the

chance to deposit $500.00 with the Fisheries Commission and regain his boat.

The right to take a direct appeal to the Supreme Court from the action of a three-judge Federal Court is recognized and permitted under Title 28 USCA, Chap. 81, Sec. 1253.

See also: *Paramount Pictures vs. Langer*
306 U. S. 619
83 L. Ed. 1025

Ex Parte Young, supra

Kennington vs. Palmer
255 U. S. 100

Terrace vs. Thompson
263 U. S. 197

Packard vs. Banton
264 U. S. 140-143

Appellees contend that the proposition that South Carolina has the right to regulate fishing within the three mile limit was adjudicated in *Toomer vs. Witsell*, supra. That statement is correct, but this case does not seek to interfere with the state in the enforcement of laws that are bona fide conservation laws. The attack made here is that the record shows that the statutes are not bona fide conservation measures, and that the State has no right to adopt and enforce the measures in question within that area. It is not the place where the measures are enforced that is under attack, but the statutes providing for the enforcement.

The Court's attention is called to the fact that appellants sought in addition to an injunction a declara-

tory judgment. It is true that no boat belonging to the appellants had been seized and kept permanently, but the fact remains that the appellees were pursuing a course of conduct that placed the appellants in a position where they faced the imposition of thousands of dollars of fines and penalties, were threatened with constant seizures and their crews intimidated and terrified. Their business had been slowed to a snail's pace. The appellees openly and freely told the three-judge Court that they had just found out what powers they had and that they intended to seize boats whenever and wherever possible. In this dilemma appellants have the right to ask this Court not only for relief but for direction.

The purpose of the Federal declaratory judgment Act is to afford an additional remedy to one who is not certain of his rights and desires an early adjudication instead of waiting until his adversary should decide to bring suit,

USCA, Title 28
Chap. 151, Sec. 2201

Berlitz School vs. Donelly & Suess
84 F. Supp. 75 (1949)

In adopting the declaratory judgment act it was Congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication,

G. E. Co. vs. Refrigeration Patent Co.
65 F. Supp. 75 (1949)

The purpose of declaratory procedure is to remove uncertainty from legal relations and clarify, quiet and

stabilize them before irretrievable acts have been undertaken, and also to enable an issue of questioned status or fact on which a whole complex of rights may depend on to be expeditiously determined,

Delaney vs. Carter Oil Co.
174 F. 2d 314

A declaratory judgment if otherwise appropriate should not be dismissed merely because another remedy is available but refusal to exercise jurisdiction properly invoked must be prompted by reasons which seem to promise administration of justice.

Franklin Life Ins. Co. vs. Johnson
157 F. 2d 653

Johnson vs. Interstate Transit Lines
163 F. 2d. 125

Under declaratory judgment act courts have jurisdiction to determine validity of statutes or ordinances before a party undertakes to act in apparent violation thereof,

Skelly Oil Co. vs. Phillips Co.
174 F. 2d. 89

Wells vs. Universal Picture Co.
166 F. 2d. 690

City of Newport News vs. Elizabeth City Co.
55 S.E. 2d. 56

Dept. of Financial Institutions vs. General Finance
86 N. E. 2d. 444

Haughton vs. Lankford
52 S.E. 2d. 111

Lord vs. Garland
168 P. 2d. 5

In view of the above authorities appellants feel that this Honorable Court most assuredly has the power to grant a declaratory judgment under Title 28, Chap. 151, Sec. 2201 of the U. S. Code.

The statutes under attack seem to show a flagrant and determined design by the State of South Carolina to openly flaunt the bill of rights of the Federal Constitution. Three of the statutes set out in the record undertake to give the State the right, without any legal proceedings whatsoever, to seize, sell and confiscate the proceeds from vessels, their apparel and their cargo. The record shows that in most instances the value of each vessel runs into thousands of dollars. The violations charged are of a most minor and trivial nature.

In this connection see: *Walkerton vs. New York*
18 N. E. 2d. 799

No day in court is afforded to appellants; no remedy provided by which they can contest the verity or truth of the allegations.

Blackmer vs. U. S.
284 U. S. 420
76 L. Ed. 375

Carter vs. Kubler
320 U. S. 243
88 L. Ed. 26

Corpus Juris Secundum 37
Forfeiture Sec. 5

It is axiomatic that once equity assumes jurisdiction, it can decide all issues and this doctrine applies equally to Federal Courts of equity.

Ewing vs. St. Louis
72 U. S. 413

Gordon vs. Washington
295 U. S. 30

Smith vs. Bourbon County
127 U. S. 105

In answer to appellees' contention that the case of *Hendry vs. Moore*, 318 U.S. 133, decides the admiralty question and the legality of ship seizures without notice, etc., it is respectfully called to the attention of the Court that the Hendry case specifically dealt with a California statute which did provide for a judicial hearing, and the court upheld that procedure. Also, the article seized was a fish net and not a large vessel. Mr. Justice Black in his dissenting opinion feared that this decision might be misconstrued, and ruefully argued, "Today it is a fish net, tomorrow it might be a tramp steamer!" The fear actually came to pass in the case at bar.

The Hendry case can also be differentiated from the case at bar on the question of admiralty jurisdiction because the Hendry case involved a proceeding in rem which was within the exception to admiralty jurisdiction whereas the present statutes allow summary seizure and make no provision for a legal proceeding.

It is further contended by appellants that the statutes allowing for summary seizure and forfeiture are illegal because they provide for excessive penalties, for example allowing forfeiture of a $20,000.00 vessel for fishing without a $25.00 license, and because the statutes provide for no legal procedure, notice or hearing, in conflict with the due process clause of the United States Constitution.

U. S. Constitution, Art. XIV

Blackmer vs. U. S., supra

Palko vs. State of Connecticut
302 U. S. 319
82 L. Ed. 288 (1937)

Scott vs. McNeal
154 U. S. 34
38 L. Ed. 896

Waters-Pierce Co. vs. State of Texas
212 U. S. 86
53 L. Ed. 417

Swanson vs. Bates
170 F. 2d. 648 (1949)

Mirkovich vs. Milnor
34 F. Supp. 409 (1940)

Finance Sec. Co. vs. Conway
146 So. 22
176 La. 456

Frahn vs. Greyling Realization Co.
195 So. 758
239 Ala. 580 (1940)

Pa. R. R. Co. vs. Driscol
198 A. 130
330 Pa. 97

Santos vs. Dondero
54 P. 2d. 764

Corpus Juris Secundum 37
Forfeiture Sec. 5

In support of their contention that summary seizure and forfeiture of fishing vessels without a legal procedure, notice, hearing nor opportunity to defend, is not a violation of the due process clause, appellees cite

Durant vs. Bennett, 54 F. 2d. 634. This case involved a gambling device, however, and it is acknowledged that the exception to the general rule forbidding summary forfeiture without a hearing is the right of a state to destroy an article of itself dangerous or inimical to the public health, welfare or morals. A fishing vessel does not belong in this category.

There is another exception where the property taken is of little value.

Lawton vs. Steele
152 U. S. 134
38 L. Ed. 385

Appellees deny that the statutes questioned provide for a taking of property without due process of law and point to Section 846 of the 1942 South Carolina statutes and the "claim and delivery" statute to support their position. We contend that Section 846 providing "Whenever by the provision of law any property real or personal shall be forfeited to the State or to any officer for its use, an action for the recovery of such property, alleging the ground of the forfeiture, *may* be brought by the proper officer in the Circuit Court," was repealed by Section 3379 of the Acts of 1949 providing for forfeiture of vessels without a hearing, which Act states "All acts or parts of act inconsistent with the provisions of this act are hereby repealed." However, even if this definite language should be construed as not repealing Section 846 insofar as forfeitures are concerned, Section 846 has not been followed by the South Carolina authorities in the cases where they have confiscated shrimp and forfeited vessels and furthermore, the language of Section 846 "An action *** *may* be brought by the proper officer ***"

is not mandatory upon the State officers but is merely optional. We have already commented in this brief on the fallacy of assuming that the appellants have an adequate remedy under the "claim and delivery" statute.

One of the statutes under attack, Section 3328, specifically permits the searching of boats, etc., without a warrant, and the arrest without a warrant of any person found thereon violating the law. This is the boldest enunciation of the "rule of force" ever adopted by a state. This court has struggled with the question of reasonable and unreasonable searches on the part of officers for years. Recently this Court was divided in *U. S. vs. Rabinowitz,* (Feb. 20, 1950) on the question of when a search was reasonable and when it was not. In that case a warrant to arrest preceded the search. The State of South Carolina has taken refuge in the action of this Court in applying the 4th amendment only as against Federal officers. This cautious position may have been right years ago but with constitutional rights being flaunted by states under this distinction, we submit that the time has come for this court to hold that a person and his home can be invaded just as illegally by a state officer as by a federal officer, and certainly set aside unconstitutional state statutes. The trend of the Supreme Court has been to broaden the scope of its scrutiny of tyrannical acts.

This court now makes no distinction where confessions are exacted through force or pressure by either state or Federal officers. Is there any logical reason why the brutal act of an officer in forcing a defendant to make a confession is frowned on, *Ashcraft vs. Tenn.*, 322 U. S. 143, *White vs. Texas,* 310 U. S. 530, but a

more brutal act of knocking down one's door, invading his house or business, ransacking his possessions, and seizing evidence is winked at. We submit that this court is never bound by precedent, and that when public policy demands, it is free to enunciate a principle in keeping with the times. We submit the time has come. Today it is fishermen. Tomorrow it could be the President.

The precise question which we are raising in this case has never been, as far as we can find, ruled on by this Court. Heretofore this Court has ruled that it would not interfere with rules of evidence by state tribunals.

The case of *Wolfe vs. Colorado*, 93 L. Ed. (Adv.) 1356, cited by appellees, thus differs from the present case, for in that case and in many of the other cases upholding the ruling of State Courts that evidence illegally obtained could be admitted in evidence, the courts were dealing with a rule of evidence. Here we have a statute which specifically allows for the unlawful search and seizure without a warrant and for the unlawful arrest of a person without a warrant. We wish to call to the attention of the Court that provision of the 14th Amendment which we believe applies to a matter of this kind, to-wit: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

In conclusion, the case of *Hynes vs. Grimes Packing Co.*, 93 L. Ed. (Adv.) 964, cited by appellees, can be used by appellants to support their position that the Federal Courts have jurisdiction, since in that case the

facts and the hazard to be encountered were practically the same as the present case. Mr. Justice Reed who delivered the majority opinion for the Court used this expression, "It is not a threat of a single prosecution *** under the findings the respondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. In the pursuit of their otherwise lawful business, respondents are threatened with criminal prosecution *** for the violation *** severe penalties are imposed including fine, imprisonment, the summary seizure of boats *** In such a situation a majority of the Court thinks that the "danger of irreparable loss is both great and immediate" and properly call forth the jurisdiction of the Court of Equity."

The argument advanced by appellees that the Federal Courts are without jurisdiction, that the damage is not irreparable, etc. and that the petition be dismissed were presented to the three-judge Court, and from their ruling that they had jurisdiction, no exceptions were taken by appellees.

Since this case will be more fully presented when reached on its merits, we deemed it unnecessary to amplify the assignments of error or present more authorities at this time. The trial court granted the appeal in this case. That action alone signified, that unlike distinguished counsel for appellees, they felt that it was a case that called for review by this Honorable Court.

We submit that this court has jurisdiction to entertain the appeal, that the matter is one of national im-

portance, and calls for a determination of the case on its merits.

Respectfully submitted,

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